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The Tyranny of Labels[*]

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The title of this Essay comes from a case decided in the Massachusetts Supreme Judicial Court that was appealed to the United States Supreme Court.[1] In *Snyder v. Massachusetts*,[2] Massachusetts' highest court held that preventing a criminal defendant from traveling with the jury to view the scene of a crime did not violate the Fourteenth Amendment's Due Process Clause.[3]

In an opinion authored by Justice Cardozo, the Supreme Court affirmed the Massachusetts Supreme Judicial Court's decision, holding that a jury could view the scene of a crime outside the presence of the defendant without violating a defendant's right to confront his accusers and be present at his trial.[4] Justice Cardozo noted that "[t]o transfer to a view the constitutional privileges applicable to a trial is to be forgetful of our history" under the English common law.[5] He pointed out that the purpose of the defendant's presence during the trial would not necessarily support a defendant's presence at a jury view of the scene.[6] Thus, the Court rejected the argument that the concept of "fairness"

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1. Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).
2. 291 U.S. 97 (1934).
3. *Id.* at 110.
4. *Id.* at 122.
5. *Id.* at 114 .
6. *Snyder*, 291 U.S. at 117 (distinguishing historical concepts of defendant's presence at trial from his

under the Due Process Clause, which requires a defendant's presence at trial, would also require a defendant's presence at a view.[7]

In noting the broadness of the term "fairness" and all it can encompass under the Fourteenth Amendment, Justice Cardozo observed that "[a] fertile source of perversion in constitutional theory is the tyranny of labels."[8] He cautioned against the tendency to expand the reach of a general rule to new situations without regard to the underlying purpose that the rule was designed to serve. Cardozo wanted courts to look beyond "labels," or simply and exclusively at the dictionary definitions of words like "evidence" or "trials," to the facts of a particular situation and make sure that the purpose of the applicable rule was relevant to those facts.[9]

Cardozo's observation brings home that so much of what happens in the law depends on how language is used and what questions are sought to be answered. Because language is inherently flexible and open-ended, legal interpretation—like all forms of interpretation—is filled at every turn with discretionary choices that can never be eliminated so long as the law remains embodied in language. Additionally, because the questions that we ask frame the terms of debate and limit the range of possible answers, suggesting or even dictating *particular* answers in advance, we can never pay enough attention to the implicit choices that are made when courts, lawyers, commentators, and members of the public ask certain questions to elicit certain answers.

Not all language is infinitely malleable, of course. Nor is every question a leading one. Some terms and phrases of the Constitution are precise enough to leave little or no room for interpretation. Judges, like all those whose work involves the interpretation of texts, are called upon every day to interpret and apply language to all sorts of mundane situations that do not seem to call for much discretion at all.

It would be equally misleading to say, however, that linguistic indeterminacy is at work only at the margins of the judicial enterprise. The exercise of discretion is a constant and recurring feature of the work that judges do. The maxim that "hard cases make bad law" is misleading if only because so much of the law consists of cases that are more or less "hard"—that is, if what is meant by "hard" is cases that can be decided in more than one way.

By the same token, while it is possible to frame questions in a way that does not suggest that one answer is more likely than another to be deemed valid, the questions we ask are almost never entirely disconnected from the context in which we ask them. There often may be some consideration that prompts one to ask one question rather than another.

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presence at view).

7. *Id.* at 116-17.

8. *Id.* at 114.

9. *Id.* at 114-15.

Perhaps more importantly than language choices, the lack of neutrality can often show up in the way a question is framed. For example, although the law has circumscribed the ability of lawyers to ask leading questions at trial, appellate courts do not have any such restrictions.

Together, these two conditions of legal interpretation, the flexibility of language and the anticipatory power of questions, mean that a lot of what passes for "neutral principles" in the law (to take Herbert Wechsler's famous formulation) is often far from neutral.[10] Not every manner of deciding a case—or interpreting a novel or reconstructing a history, etc.—is equally meritorious. Similarly, some uses of legal language and some instances of legal labeling are worse than others because they seek to disguise the choices that judges make, and because they pretend that there are no choices to be made in the first place.

This Essay addresses the "tyranny of labels" in two contexts. The first is the manner in which Justice Cardozo used the term: that judges are obliged to do more than resolve cases by resting a decision on a phrase empty of purpose or meaning when applied to specific facts.[11] Due to the indeterminacy of language and the influence of the questions asked, judges must call for *more* transparency in judicial opinion writing and require the rigors of syllogistic logic in reaching conclusions. Judges can and should make their legal reasoning as transparent and syllogistic as possible, because this kind of reasoning is what makes the exercise of judicial discretion tolerable in a democratic society, where it would otherwise be boundless.

It is not only the judiciary, however, that should be held accountable for substituting the "tyranny of labels" for measured, reasoned, and syllogistic thinking and writing. In the second context, politicians, lawyers, journalists, pundits, and the public in general can also be guilty of employing "the tyranny of labels." The quintessential example in the legal arena is substituting the label of "judicial activism" in the stead of *any* explanation, reasoned or otherwise, for disagreeing with a particular decision. Using a "label" as a shortcut in legal language can be the antithesis of transparency and of reasoning itself, whether judges employ it in their decisions or the public uses it in discussing those opinions. In both cases, as amplified below, it is a tremendous disservice to our system of justice.

The analysis begins with judicial accountability. For unelected judges, judicial accountability takes the form of considering and explaining every assumption or premise in a judicial opinion and demonstrating how these premises lead to legal conclusions. A large part of what makes the public cynical about the law is that those of us in the legal profession do not do nearly enough to demystify the language of the law and to explain where it comes

10. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (coining "neutral principles" terminology).

11. *See* Snyder v. Massachusetts, 291 U.S. 97, 114-15 (1934).

from and what it means. In a broader sense, a lack of clear and logical thinking can be compounded by judges' ignorance of the context in which citizens live their lives, applying rules mechanically without regard to the purpose for which they were designed. In short, judges may resort to formal definitions and labels as a substitute for the hard and open thinking about value choices that democratic legal reasoning requires.

There are many examples on the judicial side of the law that illustrate the use of language and the formulation of an issue or a question so as to dictate the desired answer before any neutral analysis has begun. The most recent, and the most notable because it has been acknowledged by the Supreme Court itself, is that of *Bowers v. Hardwick.*[12]

Prior to *Bowers*, the Court had responded to questions pertaining to sexual privacy by asking not whether the Constitution protected the right of married people or single people to use contraceptives,[13] to have an abortion in the first trimester of pregnancy,[14] or to marry outside of one's race,[15] but rather by asking whether the Constitution protected an individual's right to make decisions about intimate matters pertaining to sexuality and personal relationships.[16]

As it had in each of the circumstances above, one would have thought that when *Bowers* presented the question of sodomy to the Court, the Court would have determined that the issue was privacy.[17] The Court, however, without any explanation of why sodomy should be treated differently than other forms of intimate conduct, suddenly decided that the constitutional issue was no longer one of sexual privacy in general, as it had been in *Loving v. Virginia*,[18] *Griswold v. Connecticut*,[19] *Eisenstadt v. Baird*,[20] and *Roe v. Wade*.[21] Instead, the *Bowers* Court asked a different question from those posed in *Griswold* and its progeny, and consequently procured an answer different from that which a general privacy question would have compelled.[22] The *Bowers* Court asked not whether there was an individual right to sexual privacy, but rather, whether the Constitution *specifically* protected homosexual sodomy.[23]

12. 478 U.S. 186 (1986).

13. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

14. Roe v. Wade, 410 U.S. 113 (1973).

15. Loving v. Virginia, 388 U.S. 1 (1967).

16. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

17. *See supra* notes 13-16 and accompanying text (outlining Court's sexual privacy jurisprudence).

18. 388 U.S. 1 (1967).

19. 381 U.S. 479 (1965).

20. 405 U.S. 438 (1972).

21. 410 U.S. 113 (1973).

22. Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (posing narrow question of right to engage in homosexual sodomy).

23. *Id.*

Approximately fifteen years later, in *Lawrence v. Texas*,[24] the Supreme Court acknowledged that the *Bowers* Court asked the wrong question.[25] In overruling *Bowers*, the *Lawrence* Court held that Bowers "misapprehended the claim of liberty there presented" by framing the issue as whether the Constitution protects "a fundamental right to engage in consensual sodomy" when the Court's prior holdings had already made "abundantly clear" that individuals have a right to make personal decisions "concerning the intimacies of their physical relationship[s]."[26] *Lawrence* candidly acknowledged that the question the *Bowers* Court should have asked is whether adults have a right to engage in "private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[27] *Bowers* had been wrong to focus on a particular sexual act instead of upon the right to sexual privacy that encompasses acts of adult consensual sexual intimacy.[28] On this basis, the Court concluded that "*Bowers* was not correct when it was decided, and it is not correct today."[29]

Pointing out the syllogistic shortcomings of *Bowers* by exposing the flawed premises that it rested on does not necessarily ensure that all courts and judges will use analytical and logical reasoning that looks beyond a word or phrase to its meaning and the purpose of the constitutional protections at issue. For example, the majority of the Eleventh Circuit, over my dissent, stated recently that *Lawrence* cannot possibly have held that there is a fundamental right of consenting adults to engage in private sexual conduct.[30] Why? Because, notwithstanding its numerous references to rights, substantive due process, fundamental liberty interests and so forth, the *Lawrence* Court did not use the word "fundamental" to modify the word "right" in its opinion.[31]

Two cases recently before the Eleventh Circuit squarely presented the question of whether *Lawrence* recognized a fundamental right of consenting adults to engage in private sexual conduct. One case, *Lofton v. Secretary of the Department of Children and Family Services*,[32] involved a challenge to Florida's ban on gay adoption.[33] A three-judge panel upheld the law, holding that *Lawrence* had *not* recognized a fundamental right to private sexual

24. 539 U.S. 558 (2003).
25. *Id.* at 567.
26. *Id.* at 567, 577-78 (overruling *Bowers*).
27. *Id.* at 564.
28. *Lawrence*, 539 U.S. at 567.
29. *Id.* at 578.
30. *Compare* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236-37 (11th Cir. 2004) (holding *Lawrence* did not grant fundamental right of private sexual conduct), *with id.* at 1250 (Barkett, J., dissenting) (accusing majority of contravening *Lawrence*).
31. *Id.* at 1236.
32. 358 F.3d 804 (11th Cir. 2004).
33. *Id.* at 806.

intimacy, and thus the Florida ban did not burden a right of privacy.[34]

The second case, *Williams v. Attorney General of Alabama*,[35] involved a challenge to an Alabama statute that prohibited the sale of sex toys.[36] This statute was also upheld by a three-judge panel reiterating that *Lawrence* was not a "fundamental rights" case because the Court did not use that precise phrase to say that consenting adults have a "fundamental right" to engage in private sexual activity, which would include the use of sex toys.[37] Notwithstanding that the principle had been acknowledged and repudiated, *Williams* repeated the *Bowers* error of refusing to acknowledge the precedent of sexual privacy, reducing the question at issue to whether the Constitution protected the particular right to use sex toys—an approach that *Lawrence* decisively rejected.[38]

Justice Cardozo cautioned in *Snyder* against expanding the meaning of constitutional rights by using labels without reference to the particular facts of a case.[39] *Lofton* and *Williams* are examples of the reverse problem: the use of labels, such as "fundamental right," to *restrict* the scope of a constitutional protection by requiring the specific words of a label instead of its meaning. In attempting to reduce *Lawrence* to a rational basis holding, *Lofton* and *Williams* are examples of the "tyranny of labels" at work. In both instances, the Eleventh Circuit asked only whether *Lawrence* had used the precise label "fundamental right" to describe the specific conduct involved in each case. The two cases reprised the *Bowers* error, highlighting again just how much depends on the opening questions that a court uses to frame its decision. The framing of the question invited the negative answer that *Lofton* and *Williams* proceeded to provide.[40] Simply using the label without looking to its meaning in the context of the issues in *Griswold*, *Eisenstadt*, *Roe*, and *Lawrence* is a form of the "tyranny of labels" that results in the "perversion in constitutional theory" that Justice Cardozo decried.[41]

34. *Id.* at 817 (upholding statutory exclusion of homosexuals from Florida adoptions). The panel also found that the statute did not conflict with the Court's Equal Protection precedents in *Eisenstadt*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996), which require a "heightened" form of rational basis review where a law burdens personal relationships or targets a politically unpopular group. *Lofton*, 358 F.3d at 817-27 (denying viability of equal protection claim). Ultimately, the Eleventh Circuit voted to uphold the panel decision by a 6-6 vote. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1275-1313 (11th Cir. 2004) (en banc) (Birch, J., concurring), *denying reh'g to* 358 F.3d 804 (11th Cir. 2004).

35. 378 F.3d 1232 (11th Cir. 2004).

36. *Id.* at 1233-34.

37. *Id.* at 1236-37.

38. *Id.* at 1242.

39. Snyder v. Massachusetts, 291 U.S. 97, 114-15 (1934).

40. *Williams*, 378 F.3d at 1250 (holding privacy right excludes right to use sex toys); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004) (affirming ban on homosexual adoption).

41. *Snyder*, 291 U.S. at 114.

What would a more syllogistic reading of *Lawrence* look like? It would likely begin by considering the question that the *Lawrence* Court granted certiorari to hear.[42] It would then proceed to consider the precedents upon which the *Lawrence* Court relied, the language it used to describe those precedents, and the language of its holding. That analysis would yield a very different result than the *Williams* and *Lofton* courts attained.

The *Lawrence* Court granted certiorari to consider, not whether sodomy was protected by the constitution, but rather, "whether the petitioners were free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[43] The opening question of *Lawrence* was a reaction to the erroneous question posed in *Bowers*.[44] As *Lawrence* explained, the *Bowers* Court revealed its "failure to appreciate the extent of the liberty interest at stake" by framing the question before it in terms of whether there was a fundamental right to engage in homosexual sodomy.[45] The liberty interest at issue in *Lawrence*, however, goes deeper than the act of sodomy.[46] It was the liberty interest of *all* consenting adults to engage in whatever conduct is encompassed in private intimate sexual activity.[47] The more general liberty interest includes, but cannot be reduced to, a particular sexual act or activity.[48] Thus, the particular form of conduct is protected by the general right of sexual privacy.[49]

The question *Lawrence* asked did not emerge out of the blue. It had the context and history of the cases from *Griswold* to *Bowers*, and *Lawrence* went on to summarize these *fundamental rights* decisions.[50] The Court concluded that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[51]

The syllogistic form of *Lawrence* posits first that government cannot constitutionally interfere with an individual's intimate sexual conduct or intimate relationships and second that sodomy constitutes intimate sexual conduct and involves intimate relationships.[52] Therefore, the resulting conclusion must be that government cannot constitutionally interfere with an individual choice to engage in that conduct.[53] In *Lofton* and *Williams*, none of the language and analytical structure of the *Lawrence* opinion was enough to

42. Lawrence v. Texas, 539 U.S. 558, 564 (2004).
43. *Id.* at 564.
44. *Id.* at 567.
45. *Id.* at 566-67.
46. *Lawrence*, 539 U.S. at 567.
47. *Id.*
48. *Id.*
49. *Id.* at 578.
50. Lawrence v. Texas, 539 U.S. 558, 564-73 (2004).
51. *Id.* at 565.
52. *Id.* at 578.
53. *Id.*

overcome the Eleventh Circuit's "labeling" issue.[54]

The purpose here is not to suggest that *Lofton* and *Williams* were wrongly decided, hopefully my dissents in those cases will do that. Rather, these cases point out how framing devices and language choices become a part of constitutional law. *Griswold*, *Bowers*, *Lawrence*, *Lofton*, and *Williams* teach an important lesson about the framing power of language and demonstrate that the line between questions and answers is often very thin.

Courts are not the only ones that must be held accountable for utilizing the framing devices and language choices that are either devoid of any meaning at all or misleading and misinformed. Politicians, journalists, academics, and all of us must be held accountable for the use of labels that empties the words of meaning or that flat-out deceive. Labels reflect an enormous condescension toward the public and its ability to understand public policy, of which law is one form. We have reduced our political and legal discourse to competing epithets of "liberal" versus "conservative" or "activist" versus "strict constructionist." What do these phrases mean anymore? Words used to be capable of a universal definition that would be understood and accepted by all who spoke the language. Take a moment and think of a one or two sentence definition of these terms that will encompass all of their meaning and with which all who speak English agree. Any proposed definition will likely be replete with qualifiers and differences, as the same words relate to different contexts.

A fundraising letter from the Cato Institute reiterated the problem. The letter began as follows:

> One of the frustrating aspects of American politics is the box you're forced into . . . . If you get involved, you're likely to find yourself elbow to elbow with folks on your team you'd just as soon not hang out with . . . . For instance, if you admire dynamic market capitalism, does that mean you also have to support socially conservative ideas like the so called faith-based initiative? But if you agree with liberals who want to preserve the separation of church and state, does that mean you have to agree with them on supporting high taxes and income redistribution? What if you oppose Canadian style socialized medicine and also oppose the war in Iraq . . . ?

As they relate to the judiciary, the labels "judicial independence" and "judicial activism" are two distinctly value-laden terms. Judicial independence is generally deemed to be "good" and "judicial activism" is generally

54. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236-37, 1236 n.6 (11th Cir. 2004); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 816-18 (11th Cir. 2004); *see also Lawrence*, 539 U.S. at 578. Instead, the panels in these cases fixed on a single sentence towards the end of *Lawrence* stating that the Texas law "furthers no legitimate state interest," and thus concluded that the entire decision must have been a rational basis case. *Lawrence*, 539 U.S. at 578; *Williams*, 378 F.3d at 1236-37, 1236 n.6; *Lofton*, 358 F.3d at 816-18. The effect was to turn *Lawrence* into a one-sentence opinion with pages and pages of substantive due process dicta.

considered to be "bad," even though they are two sides of the same coin. What do these terms mean? Although you could find definitions of and explanations for "judicial independence," a definition of judicial activism begs the question. It seems rather to be used as a conclusory catch-all label for "bad" judging, assuming a never-stated, pre-existing definition that would somehow be commonly understood.

As an exercise, and to avoid bad judging, it might be useful to parse the term as a statutory crime is parsed in a jury instruction, enumerating each element of the offense of "judicial activism." The words themselves simply describe the judicial function. The very fact that an issue is disputed means that the "adjudicator," the judicial actor, must act, that is, make a choice. The judiciary must provide meaning to ambiguous constitutional phrases or legislative action when asked because that is its job. The meaning it glean from various sources can range across a spectrum of possible choices.

"Judicial activism"—the action of a judge—is in itself a neutral concept, although it has concededly assumed an enhanced meaning in our current society. But what meaning? Some define it as the action of a judge who substitutes his or her personal preference over the requirement of the law. The Massachusetts Supreme Judicial Court, for example, has become the preeminent symbol of an activist court. Since *Goodridge v. Department of Public Health*,[55] the Massachusetts Supreme Judicial Court has come to be synonymous in certain circles with the threat of judges who throw aside centuries of tradition in order to "rewrite" the law.[56] But did it really do that? Indeed, how many opinions acknowledge that a judge is refusing to apply the law?

Even in instances where the label has been used, it is not alleged that the judge has specifically disavowed the law. Therefore, there must be something more to the definition of "judicial activism."

Should we not require an answer to the question of what is specifically wrong with the decision being criticized? Are the facts wrong? Is precedent ignored? Is its premise incorrect? Does its conclusion fail to flow from its premise? These questions are never answered. The phrase "judicial activism" seems rather to serve as a euphemism for judicial decisions with which someone disagrees. It is a useless method of criticizing an opinion because it states only that the critic did not like the result.

The phrase "judicial activism" fails to explain why the result was wrong or whether precedent or logic failed to dictate it. At best, it reveals the shallowness of the user. At worst, and most dangerously, it is a device employed to mask an effort to subvert the basic tenet of our constitutional judicial structure: judicial independence.

55. 798 N.E.2d 941 (Mass. 2003).

56. *Id.* at 969 (declaring ban on same-sex marriage unconstitutional).

It sometimes seems, amid the chorus of protests against the supposed "activism" of unelected judges, that we have forgotten why we have an independent judiciary in the first place. The Framers were well aware that a judicial branch beholden to the public, Legislature or Executive Branches could rule impartially on the great disputes of the day. This is why we have unelected Federal judges: to immunize them from the political pressures that bear on the other branches of government. Political immunity imposes the responsibility on Federal judges to make choices through reasoned argument and then explain their choices as fully as possible. That responsibility also requires judges to recognize that political unpopularity may well be the price of their independence.

Judicial independence imposes further responsibility on the legal profession as a whole, on academia, on politicians, on the media, and on the public in general to refuse to accept the enormous condescension inherent in substituting labels for reasoned discussion about the law. We do not fully derive the benefit of the constitutional bargain that gives us judicial independence unless we realize that law is made not just when judges decide cases or legislatures promulgate statutes, but also when the public and the press participate in local and national legal debates. Their participation ultimately becomes part of "law" in the stricter sense that judges and lawyers usually understand the term, because they shape the political context in which judges are selected and their decisions are rendered.

Judicial independence belongs not to judges alone, but to the public as a whole. When we protect that independence by asking the right questions and by rejecting the "tyranny of labels," it is ultimately our own independence as sovereign citizens that we are protecting.

Deciding cases will always require judges to make choices, albeit different kinds of choices in different kinds of cases. In some cases, judges may be required simply to make credibility choices. In others, they may be forced to choose between possible meanings of statutory or constitutional phrases. A judge's job encompasses the duty to interpret unclear law. The act of judging inherently requires the decision-maker to choose between alternatives.[57]

In the public mind, and even in the writings of many legal academics, the phrase "judicial activism" has been accepted without question as the equivalent of bad judicial action when, in fact, *every* judicial action operates within a range of "activism." A court "acts" whether it limits executive or legislative action or defers to it. Although critics may debate the court's reasoning or its conclusion, the fact that the court must reach a decision one way or the other cannot be challenged.

57. As an aside, it is interesting to note that the term "statutory interpretation" does not carry the same political or negative baggage of the phrase "judicial activism" when in fact the *act* is the same in both instances—interpreting written words to reach situations not covered by the literal language.

Judicial opinions may certainly be criticized, but simply disparaging or dismissing a conclusion with which one does not agree as "judicial activism" says *nothing*. The term "judicial activism" disserves any discussion and debate. Moreover, it does not provide judges with any constructive criticism with which to analyze their own decisions.

This criticism is not directed at those who intentionally misinform with untruths, half truths, or deceptive, oversimplified labels such as "judicial activist" because admonitions for fairness would surely have little effect there. Rather, this essay targets the rest of society, including the media, the public, and especially the legal profession, whose members accept and use labels without question or challenge, permitting important substantive debates to become meaningless and ultimately un-illuminating.

When the discussion of legal questions remains at the labeling level, the debate is reduced to pronouncements that are much too superficial and narrow. Labels no longer serve as phrases of description, but as complete replacements of the objects they are supposed to represent. As a result, labels bar any real analysis. They have become signals that speak to the fears and prejudices of the listener, permitting him to validate "feelings" that the listener himself would reject as unreasonable if he were to articulate them.

Labels strip individuals and concepts of their identity. The real person or idea is not understood or debated. Rather, labels act as vacant shells or empty vessels filled with the generalized, unexamined, and erroneous perceptions that pre-exist in the label.

Society has also abdicated its responsibility by too often participating in, or at least permitting, the continuation of these "label debates" without question or challenge. Despite familiarity with the problem, academics too often perpetuate label usage by writing only for one another, shirking any obligation to communicate with the general public. Lawyers leave their analytical skills inside the courthouse or legal office instead of applying them in wider arenas of the world to understand opinions outside of their expertise and to correct existing misinformation.

The media, which serves as the public's representative and conduit in the acquisition of accurate public information, is also responsible for perpetuating label use. Concepts of independent and investigative reporting seem to be suspended when reporting on "label" debates. Journalists, for example, do not press for definition, or ask for specific substantiation of charges, much less attempt to analyze them independently. Too many times the media is content to simply report both sides' accusations.

The following exchange with a reporter provides a good illustration: the reporter called to inquire about negative comments regarding a particular case I had authored. I explained that Judges do not expand on cases beyond the written opinion and that all the answers to her questions were contained within the opinion itself. She replied that she did not have time to read opinions and

only wanted to know if the critic's representations of the opinion were accurate. This type of exchange, however astonishing, is not an isolated instance.

A reporter's obligation to investigate the subject matter of his or her story is the same, whether it means reading the central document being featured in the story or interviewing factual eye witnesses. Too often, however, reporters treat the labeling war as if the charges were the substantive story, failing to subject such charges to the same verification requirements as an actual story. Such cursory reporting underestimates the public's ability to understand the underlying legal issue, doing them a great disservice. The average American is fully capable of understanding the essence of what goes on in our legal system. Linda Greenhouse, a New York Times reporter, regularly covers complex legal concepts and debates in terms accessible to the lay person. Thus, the problem is not that the public will not understand the underlying concept. The problem is that the public does not have access to it.

Judging is much more than constitutional adjudication. Interpreting the constitution is only a small part of a judge's job. In that context, appellate courts are deliberately comprised of multiple judges because the system recognizes the merit in submitting disputes to a group with inevitably differing approaches to legal problem solving, rather than to a single judge.

Judges should be thoughtful, reflective, scholarly, and principled. These types of judges will approach all legal problems with the appropriate neutrality, and, when called upon to interpret the Constitution or the will of Congress, will do so with an honest analysis within the confines of precedent. The merits of their work product and ultimate conclusions can certainly be debated, but that debate should center on whether their scholarship was thorough in light of all the competing arguments and whether their conclusions are principled and intellectually defensible.

Asking probing and pointed questions, and answering them with reasoned and thoughtful arguments, takes more time and effort than our sound-bite-driven public sphere seems to tolerate. But a commitment to deliberative democracy requires time and effort. There are no easy ways of getting around the "tyranny of labels" because labels are designed to save time and energy, both of which are of finite supply. Nevertheless, there is nothing necessarily technical or obscure about refusing to use labels either. It is still possible, even given the massive corpus of statutes and judicial decisions that make up our legal system, and the intimidating language in which they are often written, to make legal matters comprehensible to the public. The trick is to separate the wheat from the chaff, the essential from all that is superfluous, and to explain these essentials in terms that a non-lawyer can understand. This obligation is incumbent on all of us in the legal profession, and on the media as well. Our failure to fulfill that role—to invest the time and energy that it takes to explain law and matters of public policy in general to the public—must bear some responsibility for the "tyranny of labels" that besets our public life today.